RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-5238

IN THE
SUPREME COURT OF THE UNITED STATES

LESTER RAY NICHOLS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED ii
Cases ii
Statutes ii
Other ii

PETITIONER'S REPLY BRIEF 1

I. Review Is Necessary To Resolve An Entrenched Conflict On Whether A Sex Offender Who Moves To A Foreign Country Must Register In The Jurisdiction Of His Former Residence 1

A. A "square conflict" exists 2

B. Until the conflict is resolved, SORNA's goal of uniformity will go unfulfilled 6

C. The Government's Defense Of The Decision Below Is Unpersuasive 8

II. Review Is Necessary To Determine Whether Congress's Delegation To The Attorney General To Determine Whether SORNA Applies to Pre-Enactment Sex Offenders Violates The Non-Delegation Doctrine 12

CONCLUSION 12

TABLE OF AUTHOR ITIES CITED

PAGE

Cases

Alleyne v. United States, 133 S.Ct. 2151 (2013) 12

Carr v. United States, 2014 WL 655382 (M.D. Tenn. Feb. 20, 2014) 3

Carr v. United States, 560 U.S. 438 (2010) 11

Johnson v. United States, 135 S.Ct. 2551 (2015) 12

Lockhart v. United States, No. 14-8358 5

Reynolds v. United States, 132 S.Ct. 975 (2012) 12

United States v. Branch, No. 4:15-cr-00025-AWA, Doc. 41 (E.D. Va. June 23, 2015) 3, 6

United States v. Lewis, 2015 WL 1308512 (D. Kan. March 28, 2013) 4

United States v. Lockhart, 135 S.Ct. 2350 (May 26, 2015) 6

United States v. Lunsford, 725 F.3d 859 (8th Cir. 2013) ..... passim

United States v. Murphy, 664 F.3d 798 (10th Cir. 2011) ..... passim

Statutes

42 U.S.C. § 16911(13) 8, 9

42 U.S.C. § 16913 11

42 U.S.C. § 16913(a) 8, 9

42 U.S.C. § 16913(c) 8, 10

42 U.S.C. § 16928 10

Other Authorities

The National Guidelines for Sex Offender Registration and Notification, 3 Fed. Reg. 38030-1 (July 2, 2008) 10

PETITIONER'S REPLY BRIEF

The Court should grant this petition because the lower courts are split on whether a sex offender who moves to a foreign country must update his sex offender registration in the jurisdiction where he formerly resided. The government's assertion that there is no "square conflict" on this issue lacks merit. Moreover, correcting this split is a matter of exceptional importance given Congress's stated goal of uniformity in the Sex Offender Registration and Notification Act ("SORNA").

Additionally, this Court should grant this petition to decide whether Congress's delegation to the Attorney General to determine the applicability of SORNA to pre-enactment offenders runs counter to the Constitution's principle of separation of powers. Thousands of individuals must register as sex offenders and face criminal penalties for failing to do so, not because Congress has said they must register, but because the Attorney General has said they must register. This delegation does not meaningfully constrain the Attorney General, nor does it establish an intelligible principle to guide the Attorney General in carrying out its obligations.

I. Review Is Necessary To Resolve An Entrenched Conflict On Whether A Sex Offender Who Moves To A Foreign Country Must Register In The Jurisdiction Of His Former Residence.

SORNA is Congress's latest attempt at establishing a uniform, national registration system for sex offenders. But this goal of uniformity is threatened by an entrenched conflict within the Circuits on whether a sex offender who moves to a foreign country must update his registration in the jurisdiction where he formerly resided. This case is an excellent vehicle to resolve that conflict.

For its part, the government disputes whether a conflict exists at all. The government acknowledges "tension" between the courts of appeals, but refuses to acknowledge a "square conflict" on the issue. BIO 8. The government also deems the issue unimportant because, in its view, the issue has not arisen in a sufficient number of cases. BIO 15. Neither point has merit. The courts of appeals themselves have acknowledged the conflict in factually indistinguishable cases, and, because the conflict upsets SORNA's goal of uniformity, it is in serious need of resolution.

A. A "square conflict" exists.

1. The Tenth Circuit itself has acknowledged that its decision below is in direct conflict with the Eighth Circuit's decision in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013). Judge Lucero's dissent from the denial of rehearing en banc began: "I dissent from the denial of rehearing en banc because a recent Eighth Circuit decision creates a circuit split regarding the applicability of SORNA's notice provisions to offenders who leave the country." Pet. App. 27 (citing *Lunsford*). Judge Gorsuch's dissent began: "A circuit split lingers here." *Id.* 29. The panel found that it had "squarely addressed" this issue in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), and acknowledged that *Lunsford* "disagreed with *Murphy's* interpretation of SORNA." Pet. App. 6, 8. In a short concurrence, Judge McKay thought *Lunsford* in direct conflict with *Murphy*. *Id.* 15 ("I am persuaded by [*Lunsford*], however, the majority opinion in *Murphy* currently controls"). The district court below also found that *Lunsford* reached "a conclusion contrary to *Murphy*." *Id.* 4.

In *Lunsford*, the Eighth Circuit knowingly created this conflict – "insofar as

Murphy concluded that an offender who leaves a domestic jurisdiction for a foreign jurisdiction necessarily must update his registration in the domestic jurisdiction where he formerly resided, we respectfully disagree." 725 F.3d at 862. In support of its holding, the Eighth Circuit cited Judge Lucero's dissent in *Murphy*. *Id.*

Other courts have acknowledged the split. A district court judge in Virginia tasked with a similar issue considered *Lunsford* and *Murphy* and noted that "[t]he circuits are split on the issue." *United States v. Branch*, No. 4:15-cr-00025-AWA, Doc. 41 at 7 (E.D. Va. June 23, 2015); *see also Carr v. United States*, 2014 WL 655382 (M.D. Tenn. Feb. 20, 2014) (unpublished) (adopting the Tenth Circuit's rationale and opining that the Sixth Circuit would not adopt the reasoning in *Lunsford*), appeal pending, Sixth Circuit Case No. 14-5368 (briefing completed on March 2, 2015).

2. Contrary to these judicial statements, the government asserts that no conflict actually exists. It does so primarily in light of language in *Lunsford*. BIO 13-15. There, the Eighth Circuit suggested that the decision in *Murphy* might have turned on a factual finding that the defendant in that case "still resided in Utah within the meaning of § 16911(13) when he changed his residence and triggered his reporting obligation." *Id.* The government also cites the Tennessee district court's decision in *Carr*, which suggests that *Murphy* and *Lunsford* might not conflict because the defendant in *Lunsford* purchased a round-trip ticket, whereas the defendant in *Murphy* did not. 2014 WL 655382 at *5.

The government's argument lacks merit. Even assuming that *Lunsford* and

Murphy could be reconciled,[1] *Lunsford* and the decision in this case cannot be reconciled. Like the defendant in *Lunsford*, Mr. Nichols bought a round-trip ticket when he flew to the Philippines. As the government itself explained in the district court:

> [T]he defendant purchased a round trip ticket. For his out-bound air-travel, the defendant flew from Kansas City, Missouri (MCI) to Detroit, Michigan (DTW) on November 9, 2012. The defendant had an approximately 2 hour layover in Detroit before flying on to Manila, Phillipines [sic] (MNL), with a schedule arrival time of 12:05am on November 11, 2012. The defendant's scheduled return ticket was for December 13, 2012, with travel through New York City (JFK) to a final destination of Kansas City, Missouri.

Gov't Response to Motion to Dismiss Indictment, Docket No. 17 at 1-2 (filed Oct. 29, 2013).

As Judge Lucero pointed out in dissent below, there is no difference between the facts in this case and the facts in *Lunsford*. Pet. App. 27. Both defendants abandoned residences in SORNA jurisdictions, boarded planes at the airport in Kansas City, Missouri, without first establishing new residences, purchased round-trip tickets to the Philippines, flew to the Philippines, established residences there, and did not return to the United States (until extradited by the government). Yet, courts have held that Robert Lunsford did not commit a crime but Lester Nichols did. The government is wrong to assert that no square conflict exists on this issue. The conflict is as square as it gets.

---

[1] Any reconciliation would fail. The better reading of *Lunsford* recognises the Eighth Circuit's struggle to make sense of the decision in *Murphy*. The Eighth Circuit was frank on this point, noting that *Murphy* "is no model of clarity." 725 F.3d at 862 (quoting *United States v. Lewis*, 2015 WL 1308512 (D. Kan. March 28, 2013) (unpublished)). The Tenth Circuit's extension of *Murphy* to the facts of this case – facts which are identical to those in *Lunsford* – confirms that the legal propositions in *Murphy* conflict with those in *Lunsford*.

3. Moreover, the government's claim that *Lunsford* turned on the purchase of a round-trip ticket, and not a one-way ticket, is implausible. BIO 14. The government cobbles together portions of *Lunsford* for the proposition that this fact was material to the outcome of the case. *Id.* It misrepresents *Lunsford*'s holding as standing for the proposition that the defendant in *Lunsford* did not change residences until he "decided not to use the return ticket." *Id.*

Lunsford says no such thing. In rejecting the government's argument that the defendant had to update his registration in Missouri, the Court noted that the government did not contend "that Lunsford established a new residence in Missouri after he abandoned his residence on Northwest Plaza Drive and before he boarded his flight to the Philippines." 725 F.3d at 861. The clear implication from this comment is that the abandonment of a residence, in and of itself, does not trigger a reporting obligation. Instead, "Lunsford changed his residence when he moved to the Philippines," thus triggering his reporting obligation only after "he changed his residence." *Id.* In contrast, the Tenth Circuit holds that "the abandonment of a permanent residence triggers a sex offender's obligation to update his registration," and 'the departure district remains a 'jurisdiction involved' even after the sex offender has left the state.'" Pet. App. 7. The conflict is obvious.

4. This case is not the first time in which the government has attempted to convince this Court that an obvious conflict is not actually a conflict. As one example, it employed a similar tactic recently in *Lockhart v. United States*, No. 14-8358, BIO 8-9. Despite the government's assurances that a conflict did not exist, this Court

granted certiorari in *Lockhart* to resolve a conflict in the Circuits on the meaning of a federal statute. 135 S.Ct. 2350 (May 26, 2015). The Court should do the same in this case.

B. Until the conflict is resolved, SORNA's goal of uniformity will go unfulfilled.

1. The government further argues that review is unwarranted because too few courts have addressed the issue. BIO 15. But the issue is currently pending in the Sixth Circuit, as the government mentions. BIO 15. Moreover, a district court recently grappled with the issue and found *Lunsford*, not *Murphy*, persuasive, resulting in the dismissal of a failure-to-update count. *Branch*, No. 4:15-cr-00025-AWA, Doc. 41 (E.D. Va. June 23, 2015).

The issue in *Branch* actually involved an *interstate* change in residence, not an *international* change in residence. The defendant moved from Michigan to Virginia, and the district court held that he could not be prosecuted for failing to notify Michigan authorities of his residency change. *Id.* at 9. *Branch* signifies that the conflict in this case arguably reaches beyond international travel to include the more common scenario of interstate travel. With this in mind, it is improbable to believe that this issue will not arise with sufficient frequency to warrant this Court's review.

Moreover, because the conflict is already entrenched, it does not matter how, or when, other Circuits resolve the issue. Whatever other Circuits do with it, the conflict will still persist. The government cannot deny that a majority of the Tenth Circuit has no intent to overrule its precedent in light of *Lunsford*. Only four of the twelve active judges voted to rehear this case en banc. Pet. App. 25. Nor does the government

assert that the Eighth Circuit would be inclined to reconsider *Lunsford*. Citing Judge Lucero's dissent in *Murphy*, *Lunsford* expressly disagreed with the Tenth Circuit's resolution of this issue in a case factually identical to this case. 725 F.3d at 862. The conflict will exist until this Court resolves it. There is no reason to let the conflict linger. It is best to resolve it now and end the confusion that exists in the lower courts.

2. The government fails to acknowledge that the conflict has serious consequences for SORNA's goal of uniformity. It is impossible to implement a uniform sex offender registry when jurisdictions have different rules for registration. The reality is that, as it currently stands, sex offenders who move to a foreign country (and possibly even a different state) are obligated to register in the jurisdiction of their former residence only if they live in certain jurisdictions (such as the jurisdictions within the Tenth Circuit and whatever other jurisdictions outside of those in the Eighth Circuit that choose to follow the Tenth Circuit's reasoning). That is not a uniform registration system.

Judge Lucero made this point in dissent below: "[w]e have simply replaced a 'wide disparity among State registration requirements with a wide disparity among Circuit registration requirements. In doing so, we thwart the intent of Congress and needlessly complicate an already complicated law." Pet. App. 27. "Correcting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy 'a wide disparity among State registration requirements and notification obligations for sex offenders.'" *Id.*

The government ignores Judge Lucero's dissent. This Court should not. There is

an entrenched conflict on whether a sex offender who moves to a foreign country must register in the jurisdiction in which he formerly resided. As long as this conflict persists, Congress will never achieve SORNA's stated goal of a national, uniform sex offender registration system. Review is necessary. Pet. App. 29 (Gorsuch, J., dissenting) ("In denying rehearing today to reconsider this court's position in light of *Lunsford*'s learning, we leave those who seek a resolution of this circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.").

C. The Government's Defense Of The Decision Below Is Unpersuasive.

On the merits, the government's argument provides no reason to deny review in light of the entrenched conflict. The argument is also unconvincing for four reasons.

1. The government contends that a sex offender's obligation to update a registration is triggered when the sex offender "abandons" a residence. BIO 9. But a sex offender's obligation to update a registration is triggered only "after" a change in "residence," and the obligation arises only where the defendant "resides." 42 U.S.C. § 16913(a), (c). Congress defined "resides" to mean "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). The clear import of this statutory language is that a sex offender who moves from one jurisdiction to another is not obligated to inform the former jurisdiction of the change, as the sex offender no longer has a home or "habitually lives" in the former jurisdiction. Because he no longer "resides" in that jurisdiction, he has no obligation to update his registration in that jurisdiction. Instead, the offender has an obligation

to update his registration in the arriving jurisdiction unless that jurisdiction is beyond SORNA's reach (as it is here).

The government's suggestion that a sex offender can update a registration *prior to* a change in residence is inconsistent with the statutory scheme. BIO 9. Congress used the present tense "resides," as the "jurisdiction involved," 42 U.S.C. § 16913(a), (c), and, again, it defined "resides" as the "location of the offender's home or other place where the individual habitually lives," 42 U.S.C. § 16911(13). Prior to a change in residence, "the location of the individual's home" is not the yet-to-be-lived-in home; it is the home where the offender currently resides. Because the offender does not change this residence until after he moves, it makes no sense to refer to the future home as "the individual's home," nor does it make sense to suggest that the offender "habitually lives" in a home he has not yet lived in. There is simply nothing in SORNA that requires an offender to inform a jurisdiction "in advance of his travel that he [is] abandoning his [] residence." BIO 10. That "conditional obligation" is not found within the text of SORNA's registration requirements.

2. The government suggests that our position upsets Congress's stated goal of a uniform sex offender registration system. BIO 10. Initially, this is odd criticism from a party who urges this Court to let stand a conflict that makes impossible a uniform sex offender registration system. If the government were truly worried about uniformity, it would ask this Court to grant the petition to resolve the conflict.

In any event, the government's argument lacks merit. If a sex offender moves from one SORNA jurisdiction to another, the goal of uniformity is met because the offender

must update the registration in the new jurisdiction, which must then share that information with other jurisdictions. 42 U.S.C. § 16913(c); Office of the Attorney General; *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030-1, at 38,066 (July 2, 2008). If the sex offender moves from a SORNA jurisdiction to a non-SORNA jurisdiction, as happened in this case, that offender is beyond the reach of Congress and SORNA's registration system. It is not true that the removal from the registration system of each offender who moves to a foreign country upsets principles of uniformity or comprehensiveness. SORNA is still applied uniformly, and it still comprehensively includes all sex offenders within SORNA jurisdictions. *See* 42 U.S.C. § 16928 (requiring registration of any sex offender entering a SORNA jurisdiction from a non-SORNA jurisdiction). Moreover, as a policy matter, "when a sex offender leaves the country, he no longer poses an immediate threat to the safety of children in the United States." *Lunsford*, 725 F.3d at 863.

3. The government further relies on its own Guidelines for interpreting and implementing SORNA. BIO 10-11. The Guidelines, however, were not promulgated to provide notice to sex offenders on how to comply with SORNA, but rather to "provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements into their sex offender registration and notification programs." 73 Fed. Reg. at 38,030. Thus, the Guidelines would not have provided notice to Mr. Nichols of any obligation to inform Kansas of his travel plans.

Moreover, the government makes no effort to square the Guidelines with the applicable statutes. Nor do the Guidelines cited by the government make any serious

attempt to implement the directives found in § 16913. As the Eighth Circuit found in rejecting a similar argument, "the National Guidelines [do not] grapple effectively with the language of the statute on this point." *Lunsford*, 725 F.3d at 861.

The government also suggests that it will publish additional regulations "consistent with the decision below." BIO 12 n.2. But again, any regulation consistent with the Tenth Circuit's interpretation of SORNA would conflict with the applicable statutory language. *Lunsford*, 725 F.3d at 861.[3]

4. Finally, the government contends that its interpretation is not inconsistent with this Court's decision in *Carr v. United States*, 560 U.S. 438 (2010), because the "conditional obligation" to register becomes "complete only when the three-business-day deadline had elapsed." BIO 12. But this position is contrary to the government's claim that the obligation to update a registration arises when a residence is abandoned. If abandonment is the "change in residence," there is no requirement that the defendant actually change residences or travel in interstate commerce prior to the failure to update within three days of the change in residence (for instance, if the offender relocates or travels on the fourth day after abandoning his residence).

In the end, the circuits are split on the merits, and the Tenth Circuit's position is the weaker one. Review is necessary.

[3] Moreover, the additional regulations would do nothing to resolve the conflict between the Eighth and Tenth Circuits, as the Eighth Circuit has already rejected the government's reliance on regulations that conflict with the statutory text. *Lunsford*, 725 F.3d at 861.

II. Review Is Necessary To Determine Whether Congress's Delegation To The Attorney General To Determine Whether SORNA Applies to Pre-Enactment Sex Offenders Violates The Non-Delegation Doctrine.

The government opposes review of the non-delegation doctrine issue because no conflict exists in the lower courts. BIO 16. If this were a sufficient reason to deny review, decisions like *Alleyne v. United States*, 133 S.Ct. 2151 (2013), and *Johnson v. United States*, 135 S.Ct. 2551 (2015), would not exist. But there are certain, fundamental issues that deserve this Court's attention. Whether Congress can task the country's top prosecutor with the authority to extend a criminal provision to thousands of people, then prosecute those people for violations of the provision, is one such fundamental issue. In dissent in *Reynolds v. United States*, 132 S.Ct. 975, 978 (2012), Justice Scalia (joined by Justice Ginsburg) flagged the issue for potential review, and Judge Gorsuch below urged this Court to review the issue in this case, Pet. App. 29-49.

Moreover, in opposing review, the government does not acknowledge the uncertainty within this Court's precedent on whether a delegation involving the reach of a criminal statute requires more constraint than a non-criminal delegation. BIO 17-18. This issue was preserved below. This case is an excellent vehicle for this Court to bring clarity to this important issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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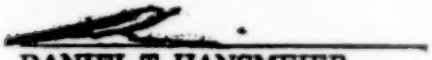

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